

Assembly Joint Resolution

No. 16

Introduced by Assembly Member Evans
(Principal coauthor: Senator Leno)

April 30, 2009

Assembly Joint Resolution No. 16—Relative to journalism shield laws.

LEGISLATIVE COUNSEL'S DIGEST

AJR 16, as introduced, Evans. Journalism shield laws.

This measure would urge the Congress and President of the United States to work together to enact a shield law for America's journalists.

Fiscal committee: no.

1 WHEREAS, A free press is vital to the publication of important
2 news within our society so that our government is accountable to
3 its citizens; and
4 WHEREAS, A journalist's promise of confidentiality to a source
5 of information is often the only way the public can learn about
6 waste, fraud, and abuse in government and the private sector, and
7 the forced disclosure of confidential sources and information will
8 cause individuals to refuse to talk to journalists, resulting in a
9 chilling effect on the free flow of information and the public's
10 right to know; and
11 WHEREAS, The most famous confidential source in United
12 States history, W. Mark Felt, also known as Deep Throat,
13 voluntarily revealed his identity as a resident of Santa Rosa 33
14 years after the Watergate scandal revealed corruption in the highest
15 levels of the Nixon White House; and

1 WHEREAS, Shield laws promote the free flow of information
2 to the public and prevent government from making journalists its
3 investigative agents because they prohibit courts from holding
4 journalists in contempt for refusing to disclose unpublished news
5 sources or information received from those sources; and

6 WHEREAS, California's shield law was first enacted in 1935
7 and later incorporated as subdivision (b) of Section 2 of Article I
8 of the California Constitution in 1980 to provide that a journalist
9 may not be held in contempt for refusing to disclose a news source
10 or unpublished information gathered for news purposes; and

11 WHEREAS, California's shield law was broadened in 2000 to
12 also provide that no testimony or other evidence given by a
13 journalist under subpoena in a civil or criminal proceeding may
14 be construed as a waiver of immunity rights provided by the
15 California Constitution, that a journalist subpoenaed in any civil
16 or criminal proceeding shall be given at least five days' notice,
17 except in exigent circumstances, and that a judge must set forth
18 findings on the record stating why the testimony of a journalist is
19 essential to guarantee the defendant's constitutionally guaranteed
20 right to a fair trial when presiding over a criminal trial wherein a
21 journalist is asserting protection under the media shield law; and

22 WHEREAS, In *O'Grady v. Superior Court* (2006) 139
23 Cal.App.4th 1423, the application of California's shield law was
24 further broadened to include the gathering and collection of news
25 by journalists publishing information through the Internet; and

26 WHEREAS, Thirty-six states: Alabama, Alaska, Arizona,
27 Arkansas, California, Colorado, Connecticut, Delaware, Florida,
28 Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine,
29 Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada,
30 New Jersey, New Mexico, New York, North Carolina, North
31 Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island,
32 South Carolina, Tennessee, Utah, and Washington, and the District
33 of Columbia, have statutory shield laws giving journalists some
34 form of privilege against compelled production of confidential or
35 unpublished information; and

36 WHEREAS, Thirteen states: Idaho, Iowa, Kansas,
37 Massachusetts, Mississippi, Missouri, New Hampshire, South
38 Dakota, Texas, Vermont, Virginia, West Virginia, and Wisconsin
39 have established varying confidentiality privileges for journalists
40 through their courts; and

1 WHEREAS, In 2009, legislation was introduced in three states,
2 Kansas, Massachusetts, and Texas, to establish a statutory shield
3 law and in two states, Maine and New York, to expand their shield
4 laws; and

5 WHEREAS, Two companion measures in the 111th Congress,
6 House Resolution 985 and Senate Bill 448, would establish a
7 federal shield law for journalists through the enactment of the Free
8 Flow of Information Act; and

9 WHEREAS, House Resolution 985 passed the House of
10 Representatives on March 31, 2009, by a voice vote, demonstrating
11 the broad bipartisan support for the bill, and Senate Bill 448 is
12 expected to be considered by the Senate Judiciary Committee soon;
13 and

14 WHEREAS, President Barack Obama cosponsored media shield
15 legislation when he was a Senator in the 110th Congress; and

16 WHEREAS, Attorney General Eric Holder, during his Senate
17 confirmation hearing in January 2009, expressed support for media
18 shield legislation; and

19 WHEREAS, The pending Free Flow of Information Act in the
20 111th Congress establishes that a federal entity may not compel a
21 journalist to divulge confidential sources unless a court determines
22 by a preponderance of the evidence that: (1) all reasonable
23 alternative sources of information have been exhausted, (2)
24 information is needed to prevent an act of terrorism or other
25 significant harm to national security, to prevent death or substantial
26 bodily harm, to investigate a leak of properly classified information
27 or private trade secret, health or financial information, and to
28 furnish eyewitness observations of a crime, and (3) taking into
29 account the public interest in, disclosure of a confidential source
30 and the public interest in gathering and disseminating news and
31 information; and

32 WHEREAS, The pending Free Flow of Information Act in the
33 111th Congress stipulates that the testimony or documents sought
34 by a federal entity from a journalist should be narrowly and
35 appropriately tailored in scope and time period; and

36 WHEREAS, A 2008 University of Arizona survey found that
37 there were 335 federal subpoenas in 2006 seeking information
38 obtained by a reporter following a promise of confidentiality and,
39 of these, 21 sought the names of confidential sources and 13 sought
40 other information obtained under a promise of confidentiality; and

1 WHEREAS, Over the last seven years, four federal courts of
2 appeals, the First Circuit, the Fifth Circuit, the Ninth Circuit, and
3 the Circuit for the District of Columbia, have affirmed contempt
4 citations issued to reporters who declined to reveal confidential
5 sources; and

6 WHEREAS, Federal courts are imposing prison sentences that
7 are increasingly severe on journalists for nondisclosure of
8 confidential sources, most recently demonstrated in 2008 by the
9 United States District Court for the District of Columbia in *Hatfill*
10 *v. Mukasey* (D.C. Cir. Mar. 7, 2008, No. 031793), in which the
11 court ordered fines of up to \$5,000 a day on a journalist and
12 expressly prohibited the journalist from seeking assistance from
13 her employer in paying the fines, even though the fine related to
14 activities occurring within the course and scope of her employment;
15 and

16 WHEREAS, In relation to *Miller v. United States* (2005) 125
17 S.Ct. 2977, and *Cooper v. United States* (2005) 125 S.Ct. 2977,
18 the Attorneys General of 34 states: Arizona, California, Colorado,
19 Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa,
20 Kentucky, Louisiana, Maine, Maryland, Massachusetts,
21 Mississippi, Montana, Nebraska, New Mexico, North Carolina,
22 North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South
23 Carolina, South Dakota, Tennessee, Texas, Utah, Vermont,
24 Washington, West Virginia, and Wisconsin, and the District of
25 Columbia, stated in an amicus brief submitted to the United States
26 Supreme Court, “A federal policy that allows journalists to be
27 imprisoned for engaging in the same conduct that these State
28 privileges encourage and protect buck[s] that clear policy of
29 virtually all states, and undermines both the purpose of the shield
30 laws, and the policy determinations of state courts and legislatures
31 that adopted them”; and

32 WHEREAS, Confidentiality of certain communications has
33 long been protected in order to further important interests, both
34 public and private, including communications between doctor and
35 patient, lawyer and client, and priest and penitent; and

36 WHEREAS, A May 2005 poll conducted by the First
37 Amendment Center and American Journalism Review found that
38 69 percent of Americans agree with the statement: “Journalists
39 should be allowed to keep a news source confidential”; now,
40 therefore, be it

1 *Resolved by the Assembly and the Senate of the State of*
2 *California, jointly,* That the Legislature of the State of California
3 respectfully urges the Congress and President of the United States
4 to work together to enact a shield law for America’s journalists;
5 and be it further

6 *Resolved,* That the Chief Clerk of the Assembly transmit copies
7 of this resolution to the President and the Vice President of the
8 United States, to the Senate Majority Leader, to the Speaker of the
9 House of Representatives, and to each Senator and Representative
10 from California in the Congress of the United States.